

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	No. 55521-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
CHARLES HENRY DUKES,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: <u>June 19, 2006</u>
	)	
	)	

COX, J. – A search incident to arrest following a traffic stop that is not pretextual is generally lawful.<sup>1</sup> Moreover, third degree driving while license suspended (DWLS 3) is an offense that does not require any independent basis for arrest. The findings of fact are supported by substantial evidence, and the conclusions of law are supported by the findings. We affirm.

Officer Danial Conine stopped the car Charles Dukes was driving after witnessing him make an illegal lane change and observing that the license plates for the car had expired. After stopping the car, Officer Conine learned that Dukes was driving with a suspended license. He arrested Dukes for the criminal traffic infraction DWLS 3 and searched both Dukes and the vehicle incident to arrest. Officer Conine discovered cocaine and marijuana in the car.

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<sup>1</sup> State v. Hoang, 101 Wn. App. 732, 739, 6 P.3d 602 (2000), review denied, 142 Wn.2d 1027 (2001).

The State charged Dukes with possession of cocaine and possession of less than forty grams of marijuana. At a CrR 3.6 hearing, Dukes moved to suppress the drug evidence, arguing that the arrest was a pretext to search for narcotics and was therefore unconstitutional. The court denied the motion and a jury convicted Dukes as charged.

Dukes appeals.

### **THE STOP AND Arrest**

Dukes argues that the search incident to arrest violated article 1, sec. 7 of the Washington Constitution because the arrest was a pretext to search for narcotics. We uphold the trial court's conclusion of law rejecting this argument.

Under article 1, sec. 7 of the Washington Constitution, neither a valid traffic stop for a non-criminal traffic infraction, nor a valid arrest of a motorist for a criminal traffic infraction may be used as a pretext by police to search the motorist's vehicle for evidence of an unrelated crime for which the police lack probable cause.<sup>2</sup> Where trial court findings are supported by substantial evidence and those findings fully support the legal conclusion that a traffic stop was not pretextual and the record clearly shows the trial court considered the totality of the circumstances, as required by Ladson, the inquiry ends.<sup>3</sup>

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<sup>2</sup> State v. Ladson, 138 Wn.2d 343, 347, 979 P.2d 833 (1999) (gang patrol officers performed unlawful traffic stop for expired tabs after tailing car for blocks, looking for a pretext to investigate unsubstantiated tip of driver's drug involvement); State v. Michaels, 60 Wn.2d 638, 644, 374 P.2d 989 (1962) (trial court properly suppressed gambling devices found in trunk where the arrest of a motorist was an unlawful pretext for officers to search automobile trunk for contraband).

Unchallenged findings are verities on appeal.<sup>4</sup> A trial court's conclusions of law are reviewed de novo.<sup>5</sup>

Dukes does not challenge the initial stop. As the trial court properly concluded, the officer had probable cause to stop the car due to the illegal lane change.<sup>6</sup>

The focus of his argument is the arrest that followed. We note the court made an unchallenged finding of fact that Officer Conine, the only witness to testify, was credible.

Officer Conine testified at the suppression hearing that he was stopped behind Dukes in a red-lighted left turn lane when he witnessed Dukes make an illegal lane change back into traffic. At that point, he decided to follow the car and run the car's license plate number in his computer. Only when he learned that the license plate was expired did he initiate a traffic stop.<sup>7</sup> When Officer Conine asked Dukes for his driver's license, Dukes produced a Washington State identification card. A computer check revealed that Dukes had a third degree suspended license. It also indicated that he had a history of narcotics convictions.

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<sup>3</sup> Hoang, 101 Wn. App. at 734.

<sup>4</sup> State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

<sup>5</sup> State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

<sup>6</sup> Conclusion of Law 4(a).

<sup>7</sup> Dukes does not challenge the validity of the initial traffic stop.

Officer Conine testified that, though he made a mental note of Dukes' VUCSA history, it did not factor into his decision to arrest Dukes for DWLS and search the car incident to arrest.<sup>8</sup> He explained that he made a note of Dukes' VUCSA history in his report only after he uncovered drugs in the car and arrested Dukes for narcotics possession. Until then, Dukes' criminal narcotics history was "nothing that was highly unusual" and was irrelevant to the traffic infraction Officer Conine was investigating. The only testimony presented at the CrR 3.6 hearing was that of Officer Conine. Dukes neither testified nor offered any rebuttal evidence.

The foregoing is substantial evidence to support finding 1(j), which Dukes challenges. It also shows support that under the totality of the circumstances that the officer's actions were reasonable.

To determine whether the arrest was pretextual, a court should consider "the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior."<sup>9</sup> For example, in State v. Ladson, the arresting officers admitted that the stop of the vehicle was pretextual.<sup>10</sup> Unlike Officer Conine, they did not make routine traffic stops while they were engaged in proactive gang patrol. Rather, the officers in Ladson testified that they selectively enforced traffic infractions "as a means to

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<sup>8</sup> Dukes does not challenge the scope of the search incident to arrest.

<sup>9</sup> Ladson, 138 Wn.2d at 358-59.

<sup>10</sup> Id. at 346.

pull over people in order to initiate contact and questioning.”<sup>11</sup> Ladson reaffirmed that the police “may enforce the traffic code . . . They may not, however, use that authority as a pretext or justification to avoid the warrant requirement for an unrelated criminal investigation.”<sup>12</sup>

Here, unlike in Ladson, Officer Conine testified that he stopped Dukes, not as a pretext to search for other criminal activity, but solely to enforce the traffic code.

We note, as Dukes argues, that the court in its oral ruling at the suppression hearing, stated hypothetically that:

the only thing that would even begin to suggest a pretextual arrest, if there was such a thing, is that [Officer Conine] noted the prior VUCSA history. But even if . . . that was the reason he decided to arrest him for DWLS, I don’t believe there would be anything improper about [the] arrest.<sup>[13]</sup>

Even if this oral remark were a correct statement of the law,<sup>14</sup> the written findings of fact and conclusions of law clearly show that the basis of the court’s

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<sup>11</sup> Id. at 345-46. The court found this distinction important, noting “a fundamental difference between the detention of a citizen by gang patrol officers aimed at discovering evidence of crimes, which is usually ‘hostile,’ and a community caretaking stop aimed at enforcement of the traffic code. Indeed, being ticketed for speeding is very different from being stopped by the gang patrol for full scale investigation.” Id. at 358 n.10 (citations omitted).

<sup>12</sup> Id. at 357.

<sup>13</sup> Report of Proceedings (December 6, 2004) at 55.

<sup>14</sup> See Ladson, 138 Wn.2d at 354 (discussing and reaffirming the “principled holding” in Michaels, 60 Wn.2d 638, that “a warrantless search may not constitutionally follow a facially valid but pretextual arrest . . .”).

denial of the suppression motion was its conclusion of law:

Officer Conine had probable cause to stop the defendant's vehicle for traffic violations committed in his presence. The defendant's vehicle failed to signal the required 100 feet before merging to the right and had expired registration, both of which constitute traffic violations. Here, the initial stop of the defendant's vehicle was clearly lawful.<sup>15</sup>

Dukes makes a constitutional argument based on an incorrect premise: that the arrest was pretextual. Because his premise is incorrect, we need not address the constitutional argument.<sup>16</sup> Likewise, the relevant statutes here<sup>17</sup> authorize arrest without independent grounds.<sup>18</sup>

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Dwyer, J.

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<sup>15</sup> Conclusion of Law 4(a).

<sup>16</sup> Anderson v. City of Seattle, 123 Wn.2d 847, 853, 873 P.2d 489 (1994) ("This court need not decide constitutional issues if nonconstitutional grounds dispose of the case.").

<sup>17</sup> RCW 10.31.100(3)(e); RCW 46.64.015.

<sup>18</sup> State v. Pulfrey, 154 Wn.2d 517, 526-27, 111 P.3d 1162 (2005).

Ajid, J.